

Pages

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 57025-G411 BY EAST GATE WATER)	
USERS ASSOCIATION)	

* * * * *

The time period for filing exceptions, objections, or comments to the June 30, 1988 revisions to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts Finding of Fact 8 as revised and Conclusion of Law 9 as revised, as well as Findings of Fact 1 through 7 and 9 through 11 and Conclusions of Law 1 through 8 as set forth in the Proposal for Decision of December 31, 1987, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

FINAL ORDER

Subject to the terms, conditions, restrictions and limitations specified below, Beneficial Water Use Permit No. 57025-G411 is granted to Eastgate Water Users Association to appropriate

CASE # 57025

groundwater at 380 gpm up to 490 acre-feet per year by means of two wells, one presently located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, Lewis and Clark County, Montana, the other to be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, Lewis Clark County, Montana. Groundwater produced by said wells is for year-round municipal use in the N $\frac{1}{2}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 29, and in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, all in Township 10 North, Range 2 West, Lewis and Clark County, Montana. The priority date of the appropriation is October 18, 1984 at 4:45 p.m.

The Permit is subject to the following express terms, conditions, limitations and restrictions:

A. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

D. Permittee shall install adequate flow metering devices. Permittee shall keep a written record of the flow and volume diverted hereunder by recording each date during which water is diverted, the rate at which it is diverted on that date, and the duration of diversion on that date, and shall provide said records to the department on request.

CASE 7

57025 - 2 -


E. Permittee shall install a ½-inch access port in both means of diversion (wells) authorized hereunder.

F. Permittee shall not drill the well to be located in the NE¼SW¼SW¼ of Section 29, Township 10 North, Range 2 West, nearer to any of its existing wells than ¼ mile.


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 23 day of August, 1988.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address this 26 day of August, 1988, as follows:

East Gate Water Users Assoc.
3819 Gradestake
East Helena, MT 59635

Steven and LeeAnn Hurford
4045 Remington
P O Box 813
East Helena, MT 59635

Keith H. Clark
Box 50
East Helena, MT 59635


LaCasa Grande Estates Water Co
One North Last Chance Gulch
Helena, MT 59601

Kenneth R. Chrest
P O Box 179
East Helena, MT 59635

Harold E. & Josephine Craig
1233 Dudley
Box 732
East Helena, MT 59635

Ralph Bahnmler
1123 East Groschell
East Helena, MT 59635

T. J. Reynolds
Helena Field Manager
1520 East Sixth Avenue
Helena, MT 59620-2301


Susan Howard
Hearing Reporter

CASE # 57025

BIB

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	REVISED PROPOSAL
NO. 57025-G41I BY EAST GATE WATER)	FOR DECISION
USERS ASSOCIATION)	

* * * * *

On February 5, 1988, pursuant to the provisions of ARM 36.12.104, Applicant was issued Interim Permit No. 57025-41I for testing purposes. On May 26, 1988, the Hearing Examiner received the evaluated results of the aquifer test for which the Interim Permit was granted. All Objectors hereto having withdrawn, said evidence was accepted for the record without objection.

On the basis of the results, the Hearing Examiner hereby revises the Proposal for Decision of December 31, 1987 as follows. The Hearing Examiner withdraws Finding of Fact 8 and Conclusion of Law 9 as set forth in said December 31, 1987 Proposal for Decision and proposes instead that the department adopt the following finding as Finding of Fact 8:

8. Providing that well #4 is drilled at least one-quarter mile to the southwest of the present well field, i.e., wells #1, #2, and #3, well interference will be minimized. Assuming such a placement of well #4, water will be physically present at the proposed points of diversion throughout the proposed period of diversion, i.e., drawdown in wells #3 and #4 will never be so great that said well can not be pumped at the rate proposed, even if all four wells in the well field are pumped simultaneously. (May 16, 1988 report by William Uthman, Geohydrologist, DNRC Hydroscience Section);

CASE # 57025

and the following conclusion as Conclusion of Law 9:

9. The record shows that there are unappropriated waters in the source in the amount applicant seeks, and that throughout the period of appropriation the amount sought is available. (Finding of Fact 8.) Therefore, it is hereby concluded that the requirements of MCA §85-2-311(1)(a) are met.

On the basis of the foregoing proposed Finding of Fact and Conclusion of Law, as well as the unrevised proposed Findings of Fact and Conclusions of Law set forth in the Proposal for Decision of December 31, 1987, the Hearing Examiner hereby proposes the following:

ORDER

Subject to the terms, conditions, restrictions and limitations specified below, Beneficial Water Use Permit No. 57025-G411 is granted to Eastgate Water Users Association to appropriate groundwater at 380 gpm up to 490 acre-feet per year by means of two wells, one presently located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, Lewis and Clark County, Montana, the other to be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, Lewis Clark County, Montana. Groundwater produced by said wells is for year-round municipal use in the N $\frac{1}{2}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 29, and in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, all in Township 10 North, Range 2 West, Lewis and Clark County, Montana. The priority date of the appropriation is October 18, 1984 at 4:45 p.m.

The Permit is subject to the following express terms, conditions, limitations and restrictions:

A. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

D. Permittee shall install adequate flow metering devices. Permittee shall keep a written record of the flow and volume diverted hereunder by recording each date during which water is diverted, the rate at which it is diverted on that date, and the duration of diversion on that date, and shall provide said records to the department on request.

E. Permittee shall install a ½-inch access port in both means of diversion (wells) authorized hereunder.

F. Permittee shall not drill the well to be located in the NE¼SW¼SW¼ of Section 29, Township 10 North, Range 2 West, nearer to any of its existing wells than ¼ mile.

NOTICE

The revised proposal for decision is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the revisions to the proposal for decision may file exceptions to the revisions with the Hearing

Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the revisions to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.


Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record.

Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 30 day of June, 1988.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing REVISED PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 1st day of July, 1988, as follows:

East Gate Water Users Assoc.
3819 Gradestake
East Helena, MT 59635

Steven and LeeAnn Hurford
4045 Remington
P O Box 813
East Helena, MT 59635

Keith H Clark
Box 50
East Helena, MT 59635

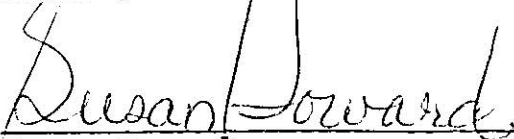
LaCasa Grande Estates Water Co
One North Last Chance Gulch
Helena, MT 59601

Kenneth R. Chrest
P O Box 179
East Helena, MT 59635

Harold and Josephine Craig
1233 Dudley
Box 732
East Helena, MT 59635

Ralph Bahnmitter
1123 East Groschell
East Helena, MT 59635

T. J. Reynolds
Helena Field Manager
1520 East Sixth Avenue
Helena, MT 59620-2301


Susan Howard
Hearing Reporter

5B

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) INTERLOCUTORY ORDER
NO. 57025-G41I BY EAST GATE WATER)
USERS ASSOCIATION)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in the Alternative in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision in the Alternative of December 31, 1987, and incorporates them herein by reference.

WHEREFORE, and as Applicant timely filed a request for an Interim Permit and paid the requisite \$10.00 fee, the department enters the following:

INTERLOCUTORY ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Interim Permit No. 57025-G41I is hereby granted authorizing diversion, for testing purposes only, of up to 380 gpm

CASE # 57025

by means of two pumped groundwater wells, one located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, the other located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, all in Township 10 North, Range 02 West, Lewis and Clark County, Montana. Groundwater produced while testing said wells may be used for municipal use in the N $\frac{1}{2}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 29, and in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, all in Township 10 North, Range 02 West, Lewis and Clark County, Montana.

The Interim Permit is subject to the following express terms conditions, limitations and restrictions:

A. The Interim Permit will expire three years from the date of issuance, or upon receipt by the department of the data to be collected hereunder, whichever occurs first.

B. The Interim Permit is to be used solely for documenting the productive capacity of the source, i.e., to allow Interim Permittee an opportunity to prove that the criterion stated in MCA §85-2-311(a) is met. Therefore, water may be diverted under the Interim Permit only to the extent diversion is reasonably necessary for testing purposes. However, any water produced by test operations may be used for municipal purposes.

C. On or before the expiration of the three-year period, Interim Permittee shall present the department with documentation of all data collected. Failure to present such documentation will result in summary denial of the provisional permit.

If, upon critical department review of the data, it is determined that Interim Permittee has met its burden, i.e., that the aquifer has sufficient productive capacity to allow sustained production at the maximum rate requested hereunder while

simultaneously diverting at the maximum rate allowed under Permit No. 12871-g41I, a Final Order will be issued granting a provisional permit to appropriate the requested rate and volume. If the documentation shows insufficient productive capacity in the source to allow such sustained production, a Final Order will be issued which may grant a reduced (less than that applied for) rate and, if necessary, a reduced volume of water, commensurate with the productive capacity of the source. If the productive capacity of the source is insufficient to sustain any withdrawal hereunder, a Final Order will be issued denying the provisional permit.

D. The issuance of an Interim Permit does not entitle Interim Permittee to a provisional permit, nor does Interim Permittee obtain a vested right to an appropriation by virtue of any action taken or investment made, where the provisional permit is denied or modified from the terms of the Interim Permit.

E. Nothing herein shall be construed to authorize the Interim Permittee to divert water to the detriment of any senior appropriator.

F. The Interim Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

G. Nothing herein shall be construed to affect or otherwise reduce the Interim Permittee's liability for damages which may be caused by the exercise of this Interim Permit, even if such damage is a necessary and unavoidable consequence of the same.

H. Interim Permittee shall install adequate flow metering devices. Interim Permittee shall keep a written record of the flow and volume diverted hereunder by recording each date during which water is diverted, the rate at which it is diverted on that date, and the duration of diversion on that date, and shall provide said records to the department on request.

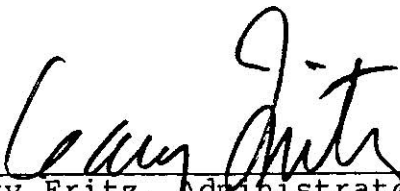
I. Interim Permittee shall install a ½-inch access port in both means of diversion (wells) authorized hereunder.

J. The priority date of any provisional permit authorized hereunder is October 18, 1984 at 4:45 p.m.

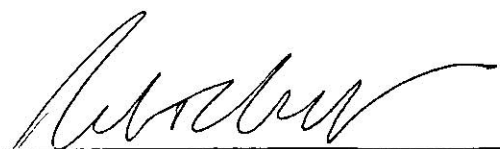
K. Any provisional permit ultimately issued hereunder shall, with the potential exception of the amount of water authorized diverted (see paragraph "C" supra), contain the same parameters as set forth in the Interim Permit, and shall be subject to the terms, conditions, restrictions, and limitations set forth in paragraphs "E" through "J", supra, made applicable to the provisional permit.

L. Interim Permittee shall submit annual progress reports to the department.

DONE this 2 day of February, 1988.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing INTERLOCUTORY ORDER was served by mail upon all parties of record at their address or addresses this 3rd day of February, 1988, as follows:

East Gate Water Users Assoc.
3819 Gradestake
East Helena, MT 59635

Steven and LeeAnn Hurford
4045 Remington
P O Box 813
East Helena, MT 59635

Keith H. Clark
Box 50
East Helena, MT 59635

Kenneth R. Chrest
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East Helena, MT 59635

Harold E. & Josephine Craig
1233 Dudley
Box 732
East Helena, MT 59635

Ralph Bahnmitter
1123 East Groschell
East Helena, MT 59635

LaCasa Grande Estates Water Co.
One North Last Chance Gulch
Helena, MT 59601

T. J. Reynolds
Helena Field Manager
Helena, MT 59620-2301
(inter-departmental mail)

Susan Howard
Susan Howard
Hearings Examiner

B.B

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 57025-G411 BY EAST GATE WATER)	IN THE ALTERNATIVE
USERS ASSOCIATION)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on November 17, 1987, in Helena, Montana.

Appearances

The Applicant, East Gate Water Users Association, was represented by Jim Melstad, Vice-President of East Gate Water Users Association.

Nick Clos, certified water and sewer operator, appeared as a witness for the Applicant.

Rick Rosa, a member of the board of directors of East Gate Water User Association, appeared as a witness for the Applicant.

Brian Harrison, hydrogeologist, appeared as a witness for Applicant.

No Objector (timely or untimely) appeared either in person or by representative.

CASE # 57025

William Uthman, hydrogeologist, and James Beck, agricultural engineer, appeared as Department of Natural Resources and Conservation (hereafter "department" or "DNRC") staff witnesses.

Preliminary Matters

I. Objector Keith Clark was excused from making an appearance at the hearing either in person or by representative. (See department file: letter to Keith Clark, October 20, 1987.) Accordingly, he will not be considered in default for failure to appear and may continue to exercise his rights as a party hereto. It is further noted that pursuant to Objector Clark's request, an exhibit was introduced for the record by the Examiner on his behalf. See Objector Clark Exhibit 1.

II. At the hearing, the department, through James Beck, proposed two conditions for inclusion in the Permit, if granted. As the proposed conditions are standard record keeping and inspection access conditions, and there was no objection to the inclusion of these conditions, the proposed conditions shall be included in any Permit granted. See conditions "H" and "I" infra.

Exhibits

The Applicant presented one exhibit for inclusion in the record.

Applicant's Exhibit 1 (a map of the East Gate subdivision, showing the location of three existing wells owned by Applicant, as well as a fourth proposed well) was admitted without objection.

The department presented one exhibit for inclusion in the record.

Department Exhibit 1 (A 15-page memorandum, accompanied by a "Figure" and two (2) appendices, prepared by William Uthman, dated August 6, 1987) was admitted without objection.

One exhibit was presented for the record on behalf of Objector Keith Clark.

Objector Clark Exhibit 1 (A report entitled "Evaluation of Shallow Aquifers in the Helena Valley, Lewis and Clark County, Montana", USGS Water Resources Investigations Open-File Report 80-1102, pp. 9-23) was admitted without objection.

Proposed Findings of Fact

1. Section 85-2-302 MCA (1985) provides that "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. The application in this matter was regularly filed with the DNRC on October 18, 1984 at 4:45 p.m.

3. By this application, Applicant seeks to divert 380 gallons per minute (gpm) up to 490 acre-feet of groundwater per year by means of two pumped groundwater wells, one (referred to by Applicant as "well #3") located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, Township 10 North, Range 02 West, Lewis and Clark County, Montana, the other (as yet undrilled "well #4") to be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section

29, Township 10 North, Range 02 West, Lewis and Clark County, Montana. Groundwater produced by said wells is for year-round municipal use in the W $\frac{1}{2}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of Section 29, and in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, all in Township 10 North, Range 02 West, Lewis and Clark County, Montana.

4. The pertinent facts of the application were published in The Independent Record, a newspaper of general circulation in the area of the source, on April 10 and 17, 1985.

5. Well #3 is presently operational and has been utilized by Applicant.

6. Applicant estimates that it will require a maximum of three years to complete well #4, and that full utilization of the amounts herein requested will occur by 1998. (Application, testimony of Jim Melstad.)

7. Wells #3 and #4 would be manifolded with two existing wells (referred to by Applicant as wells #1 and #2; both presently operated under Permit No. 12871-g41I, which authorizes diversion of 500 gpm up to 320 acre-feet per year), for year-round municipal use. Sufficient water will be diverted hereunder, and under Permit No. 12871-g41I, to keep an existing 250,000 gallon storage tank filled to 80 percent capacity. All four wells will not ordinarily be pumped simultaneously; however, during periods of peak demand when the maximum rate allowed under the combined Permits is required, it will be necessary to do so.¹ (Testimony of Jim Melstad.)

¹At the flow rate requested herein (380 gpm), Applicant would have to pump wells #3 and #4 throughout 80 percent of the year to yield an annual volume of 490 acre-feet. However, Applicant must also pump wells #1 and #2 throughout 40 percent of the year, at the flow rate authorized in Permit No. 12871-g41I (500 gpm), to yield the permitted annual volume of 320 acre-feet. Thus, a period of simultaneous pumping is evidently contemplated.

8. Because wells #3 and #4 are quite close to wells #1 and #2, there is a potential for substantial interference effects from wells #1 and #2. That interference, together with autodrawdown in wells #3 and #4 caused by pumping, and interference between wells #3 and #4, may produce a cumulative drawdown yielding a water level which is below the level of the pumps in wells #3 and #4. (Department Exhibit 1, p. 13.) It is thus possible that water will not be physically present at the proposed points of diversion in the amount requested by Applicant throughout the proposed period of diversion.

9. The maximum cumulative drawdown predicted to occur in those wells (other than wells owned by Applicant) which lie closest to wells #3 and #4, i.e., the wells of Objectors Clark and Hurford, as a result of operation of wells #3 and #4, is .12 feet. (Department Exhibit 1, p. 10.)

10. No objector provided any evidence detailing the operation of the wells of any Objector hereto. Therefore, whether a maximum .12-foot drawdown would affect any Objector's ability to divert cannot be ascertained from the record.

11. There is no evidence in the record of planned uses or developments of area groundwater for which a permit has been issued or for which water has been reserved.

Proposed Conclusions of Law

1. The department has jurisdiction over the subject matter hereunder, and over the parties hereto. MCA Title 85, Chapter 2, Part 3 (1985).

2. The department gave proper notice of the hearing (Finding of Fact 4) and, all substantive and procedural requirements of law and rule appearing fulfilled, the matter is properly before the Hearing Examiner.

3. With the exception of Objector Keith Clark, see Preliminary Matters, supra, those Objectors who failed to appear at the November 17, 1987 hearing are in default, and their objections in this matter are dismissed. See Administrative Rule of Montana (ARM) 36.12.208.

4. MCA § 85-2-311 (1985) provides that the department shall issue a permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

5. The proposed use, municipal use, is a beneficial use of water. MCA §85-2-102(2).

6. The proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved. (Finding of Fact 11.)

7. The proposed means of diversion, construction and operation hereunder, i.e., two groundwater wells manifolded together, is adequate.

8. The record showing that the maximum potential drawdown of the groundwater wells of other appropriators due to operation of two wells hereunder is .12 foot, and no Objector having elevated Applicant's burden by producing specifics regarding the operation of that Objector's well and alleging why a .12-foot drawdown would adversely affect his operation, and a .12-foot maximum drawdown not otherwise appearing to constitute adverse effect, it is hereby concluded that this proposed appropriation will not adversely affect the water rights of prior appropriators. See In the Matter of Application for Beneficial Water Use Permit No. 55834-s76LJ by Zon and Martha M. Lloyd, Proposal for Decision, January 22, 1987, pp. 21-23 (Final Order, April 23, 1987).

9. MCA § 85-2-311(a) requires that the record show that, at least in some years, there are unappropriated waters in the source, in the amount applicant seeks, and that in those years throughout the period of appropriation the amount sought is available. In the Matter of Application for Beneficial Water Use Permit No. 41255-q41B by A. W. Allred, Proposal for Decision, August 28, 1982, p. 20 (Final Order, November 1, 1984). In the instant case, the record

shows that pumping of all of Applicant's wells (wells #1 through #4) simultaneously may cause sufficient cumulative drawdown in wells #3 and #4 (at least) that, after an unknown period of pumping, water may not be physically available in wells #3 and #4, the proposed points of diversion. (Finding of Fact 8.) Thus, as Applicant does intend to pump all four wells at once during a portion of the year (Finding of Fact 4), and as the only evidence of record pertaining to water availability shows that water might not be available in the amount, i.e., at the flow rate, Applicant seeks throughout that portion of the requested period of appropriation, it must be concluded that the criterion set forth in MCA §85-2-311 (a) has not been met.

However, it must be noted that, due to the peculiarly inaccessible nature of a groundwater source, accurate prediction of an aquifer's production capacity, in advance of drilling the well to be used as the means of diversion, is often difficult. Thus, this criterion in groundwater applications is often susceptible of proof only through utilization of an Interim Permit. See ARM 36.12.104.

Because the information available to the department does not indicate that the requirements of MCA §85-2-311(a) cannot be met, (Finding of Fact 8) and the Hearing Examiner having found that all other criteria have been met, see Conclusions of Law 5 - 8 supra., issuance of an Interim Permit pursuant to ARM 36.12.104 for purposes of proving water availability is hereby deemed appropriate in this matter, providing Applicant requests an Interim Permit and remits a fee of \$10.00. If the Applicant does not request an Interim Permit, it is proposed that the Application in this matter be denied for

failure to prove that all criteria set forth in MCA §85-2-311 are met.

10. If Applicant requests and receives an Interim Permit and, after appropriate test pumping of wells #3 and #4, it is found that the rate and/or volume applied for hereunder can not be produced due to unavailability of water in the source, a provisional permit may issue for amounts (not to exceed those requested in the Application) reflecting the actual production capacity of the aquifer, or the provisional permit may be denied if the production capacity of the aquifer is insufficient to sustain any withdrawal hereunder.

WHEREFORE, based upon the foregoing Proposed Findings of Fact and Proposed Conclusions of Law, the Hearing Examiner propounds the following:

PROPOSED INTERLOCUTORY ORDER

If, within 20 days of the date of Applicant's receipt of this Order, Applicant requests that an Interim Permit be issued and pays the requisite \$10.00 fee, pursuant to the provisions of ARM 36.12.104, Interim Permit No. 57025-G41I will be issued for aquifer testing purposes subject to the following terms, conditions, restrictions, and limitations, and the record will be held open for receipt of the test data. If such request and payment are not timely made, Applicant will be deemed to have waived the option to receive an Interim Permit, and a Final Decision denying the provisional permit will issue based upon the existing record.

If issued, Interim Permit No. 57025-G41I will authorize diversion, for testing purposes only, of no more than 380 gpm up to

490 acre-feet of groundwater per year between January 1 and December 31, inclusive, each year by means of two pumped groundwater wells, one located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, the other located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, all in Township 10 West, Range 02 West, Lewis and Clark County, Montana. Groundwater produced by said wells is for year-round municipal use in the N $\frac{1}{2}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ of Section 29, and in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, all in Township 10 North, Range 02 West, Lewis and Clark County, Montana.

The Interim Permit is subject to the following express terms conditions, limitations and restrictions:

A. The Interim Permit will expire three years from the date of issuance, or upon receipt by the department of the data to be collected hereunder, whichever occurs first.

B. The Interim Permit is to be used solely for documenting the productive capacity of the source, i.e., to allow Interim Permittee an opportunity to prove that the criterion stated in MCA §85-2-311(a) is met. Therefore, water may be diverted under the Interim Permit only if it is diverted for testing purposes. However, any water produced by test operations may be used for municipal purposes.

C. At the expiration of the two-year period, Interim Permittee shall present the department with documentation of all data collected. Failure to present such documentation will result in summary denial of the provisional permit.

If, upon critical department review of the data, it is determined that Interim Permittee has met its burden, i.e., that the aquifer has sufficient productive capacity to allow sustained production at the maximum rate requested hereunder while

simultaneously diverting at the maximum rate allowed under Permit No. 12871-g41I, a Final Order will be issued granting a provisional permit to appropriate the requested rate and volume. If the documentation shows insufficient productive capacity in the source to allow such sustained production, a Final Order will be issued granting a reduced (less than that applied for) rate and, if necessary, a reduced volume of water, commensurate with the productive capacity of the source. If the productive capacity of the source is insufficient to sustain any withdrawal hereunder, a Final Order will be issued denying the provisional permit.

D. The issuance of an Interim Permit does not entitle Interim Permittee to a provisional permit, nor does Interim Permittee obtain a vested right to an appropriation by virtue of any action taken or investment made, where the provisional permit is denied or modified from the terms of the Interim Permit.

E. Nothing herein shall be construed to authorize the Interim Permittee to divert water to the detriment of any senior appropriator.

F. The Interim Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

G. Nothing herein shall be construed to affect or otherwise reduce the Interim Permittee's liability for damages which may be caused by the exercise of this Interim Permit, even if such damage is a necessary and unavoidable consequence of the same.

H. Interim Permittee shall install adequate flow metering

devices. Interim Permittee shall keep a written record of the flow and volume diverted hereunder by recording each date during which water is diverted, the rate at which it is diverted on that date, and the duration of diversion on that date, and shall provide said records to the department on request.

I. Interim Permittee shall install a ½-inch access port in both means of diversion (wells) authorized hereunder.

J. The priority date of any provisional permit authorized hereunder is October 18, 1984 at 4:45 p.m.

K. Any provisional permit ultimately issued hereunder shall, with the potential exception of the amount of water authorized diverted (see paragraph "C" supra), contain the same parameters as set forth in the Interim Permit, and shall be subject to the terms, conditions, restrictions, and limitations set forth in paragraphs "E" through "J", supra, made applicable to the provisional permit.

NOTICE

This Proposal is a recommendation, not a final decision. All parties are urged to review the foregoing Proposal carefully including the legal land descriptions. Any party adversely affected by the Proposal may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the Proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the Proposal to which exception is taken, the reason for the

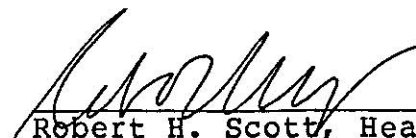
exception, and authorities upon which the exception relies. No decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the Proposal.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 31 day of December, 1987.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the PROPOSAL FOR DECISION IN THE ALTERNATIVE was served by mail upon all parties of record at their address or addresses this 49 day of January, 1988, as follows:

East Gate Water Users Assoc.
3819 Gradestake
East Helena, MT 59635

Steven and LeeAnn Hurford
4045 Remington
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East Helena, MT 59635

Keith H. Clark
Box 50
East Helena, MT 59635

LaCasa Grande Estates Water Co.
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Helena, MT 59601

Kenneth R. Chrest
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East Helena, MT 59635

T.J. Reynolds
Field Manager
Helena Field Office
1520 E. 6th Ave.
Helena, MT 59620-2301
(inter-departmental mail)


Sally Martinez
Secretary

CASE # 57025